IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	

RESPONSE TO PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO COMPLY WITH CERTAIN REQUIREMENTS OF THE AMENDED SCHEDULING ORDER (Dkt #1618)

Defendants Peterson Farms, Inc., Willow Brook Foods, Inc., Simmons Foods, Inc., George's, Inc., George's Farms, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., and Tyson Foods, Inc. respectfully oppose Plaintiffs' Motion for Extension of Time to Comply with Certain Requirements of the Amended Scheduling Order ("Motion"). Plaintiffs' Motion seeks a four-month extension of the date when Plaintiffs must disclose their initial expert reports. This delay, as proposed, will substantially hinder the progress of this litigation and materially prejudice Defendants' ability to prepare a comprehensive defense.

Unlike most litigation, this case is almost entirely expert-driven. Plaintiffs' expert reports will not simply comment on, but in fact will contain, the "facts" upon which the yet-undisclosed bulk of Plaintiffs' case relies. Until Defendants receive those reports and conduct discovery into them, Defendants cannot prepare an effective and comprehensive defense. Plaintiffs make no showing why, nearly three years after filing suit, they are unable to comply with the Court's scheduling order. Nor do Plaintiffs demonstrate that any particular expert has been hindered in

his or her work. Plaintiffs' showing falls well short of the "good cause" required to modify a scheduling order, particularly at such a late date. As this Court previously held, "[m]odifications to the scheduling order, which has been relied upon by counsel since its entry on November 15, 2007, should not be made without clear benefit to all parties." [Dkt. #1459 at 2]. Because the only practical effect of Plaintiffs' requested delay would be to deprive Defendants of four months to respond to Plaintiffs' scientific case, Defendants respectfully oppose the Motion.

A. Plaintiffs Have Not Demonstrated That The Court's Existing Schedule Could Not Have Been Met With Diligent Effort Over The Past Three Years

At some point litigation must proceed to judgment and come to an end. The purpose of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Accordingly, the Federal Rules provide for district courts to enter scheduling orders to govern the course of litigation. As one District Court has noted, "scheduling orders must mean something if the parties and the court are ever to achieve some sort of finality." *ADC Comms, Inc. v. Thomas & Betts Corp.*, 2001 WL 1381098 at *4 (D. Minn. Oct. 18, 2001). Because the parties and courts rely on the deadlines set out in a scheduling order, such orders may be amended only upon a "showing of good cause." Fed. R. Civ. P. 16(b).

This standard is a demanding one. Merely demonstrating a "[l]ack of prejudice to the nonmovant does not establish good cause." *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1220 (D. Kan. 1995). Instead, the movant must demonstrate not only that the existing schedule is inconvenient or even challenging, but that despite the movant's diligent efforts the schedule "*cannot be met*." *Colorado Visionary Academy v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2007) (emphasis added). Nothing exempts expert reports from this requirement. *See, e.g., Marcin Eng'g, Inc. v. Founders at Grizzly Ranch, LLC*, 219 F.R.D. 516, 521 (D. Colo.

2003) (denying request to extend time for expert discovery under Rule 16(b) "good cause" standard). Plaintiffs have not and cannot make such a showing here for several reasons.

First, by any measure, Plaintiffs have had ample time to complete their expert reports. Plaintiffs filed their lawsuit in June 2005, nearly three years ago. Plaintiffs have made no showing why three years is an insufficient time to develop support for their allegations. Unlike many cases where the plaintiff is unprepared to begin expert work when the complaint is filed, in this case Plaintiffs knew even before this case began that they would have to prepare and submit expert reports. Indeed, Plaintiffs began their expert work before the complaint was filed. *See, e.g.*, Exhibit 1 (status report dated April 9, 2005, reporting on work by CDM (Dr. Olsen) and Lithochimeia (Dr. Fisher)). Moreover, the deadline for expert reports has been long known. Under the Court's first scheduling order, issued on March 9, 2007, Plaintiffs' initial expert reports were due on December 3, 2007. See Dkt. #1075. Plaintiffs thus have had longstanding notice and abundant time—indeed, an extraordinary amount of time—to prepare their expert reports. Yet nowhere in their Motion do Plaintiffs demonstrate why, with all this time, its experts, severally or individually, have been unable to comply with the Court's scheduling order. Under Rule 16(b), Plaintiffs bear the burden of proving both "good cause" and also diligence. After three years, diligence should not be presumed.

Second, the Court has already delayed the deadline for production of initial expert reports once, and has denied Plaintiffs' repeated requests for further extensions. In October 2007, in response to Cargill's motion to modify the existing scheduling order, *see* Dkt. #1297, Plaintiffs sought an across-the-board eight-month delay, which would have resulted in Plaintiffs' initial expert reports being due on August 4, 2008, *see* Dkt. #1322, at 13. Plaintiffs further sought to delay until February 2009 the production of "relief-related" opinions. *Id*. The Court granted

some delay, setting the current April 1, 2008, date, but otherwise denied Plaintiffs' request for a longer delay as to initial expert reports. Dkt. #1376. On January 15, 2008, the Court rejected Plaintiffs' renewed effort to delay portions of their initial expert reports, stating unequivocally that Plaintiffs' "experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008 for Plaintiff." Dkt. #1459 at 2. Most recently, on March 14, 2008, the Court rejected Plaintiffs' effort to renew that request in its "Objection" to the Amended Scheduling Order. *See* Dkt. #1630.[1] Despite these repeated rejections, and without explaining what has changed, Plaintiffs renew their request that their initial expert reports be due on August 4, 2008. The Court should again reject the request.

Third, the bases asserted in Plaintiffs' Motion demonstrate neither diligence nor "good cause" for delay. Plaintiffs first cite the outstanding Cargill Rule 30(b)(6) deposition and their own outstanding request that the Court's "five year temporal limit" be lifted. Motion at 2-4. But beyond noting the fact that these are outstanding, Plaintiffs do not explain how either of these matters prevents any specific expert from tendering a timely opinion. Plaintiffs' burden is to explain why they *cannot comply* with the existing scheduling order despite their diligence. They have not done so.

Plaintiffs have known about these two asserted bases for delay for a long time, but have never suggested that a particular expert was being deprived of needed information. For example, Plaintiffs raised the issue of the temporal scope of discovery with the Court on August 24, 2006, almost two years ago. *See* Dkt. #894. The parties and the Court have repeatedly discussed and applied the Court's five-year limit on discovery since that time. If the information Plaintiffs expect to secure is truly of such significance to their experts' work, their lack of diligence in

[1] Thus, Plaintiff's previously outstanding "Objection" also does not justify further delay. Motion at 4-5.

pressing this claim is as remarkable as it is telling. Regardless, as Defendants' now-filed responses regarding the five-year limit make clear, first, the majority of Defendants have already produced all responsive information in their possession without regard to the five-year limit, and second, Plaintiffs' Motion to expand the five-year time limit is unsound as a consequence of its failure to specify what historical information is needed from Defendants to permit Plaintiffs' experts to complete their analyses.

Similarly, Plaintiffs have discussed the Cargill 30(b)(6) deposition for many months but, to this date, have never identified any information that they may obtain from that deposition that would be critical to any particular expert's work. Cargill and Plaintiffs are now in the process of working out the timing for this deposition, but at any rate, a single outstanding corporate deposition hardly justifies a four month delay for all expert reports.[2] To the extent that some relevant information comes to light at a later date, the more appropriate course would be to seek to supplement a specific report at that time, not to delay all expert reports by four months now on nothing more than speculation that the Cargill deposition might produce information that changes an expert opinion.

Finally, Plaintiffs assert that the burdens of the recent preliminary injunction hearing, which they demanded, have so "distracted" their experts as to prevent them from timely completing their expert reports. Motion at 5. This argument cannot be credited, as Plaintiffs themselves elected to wait more than two years to file a motion for preliminary injunction, and then insisted on an accelerated schedule. Plaintiffs began preparing their expert case in support of their motion for a preliminary injunction beginning as early as 2005. *See* Exhibit 2

[2] The balance of Plaintiffs' objections regarding, for example, "bird-numbers" and the need to redo 30(b)(6) depositions similarly reflect the natural working-out process of discovery, and do not justify a whole-sale four month delay.

(memorandum from David Page to Roger Olsen dated September 14, 2005, regarding planned expert case to support motion for preliminary injunction). Plaintiffs did not reveal that expert case despite Defendants' multiple discovery requests, and filed the motion at the time of their own choosing. Plaintiffs thus had ample time to prepare in advance. Indeed, Plaintiffs were the only parties that knew about their plans and the scope of the accompanying expert testimony. To the extent that Plaintiffs' surprise preliminary injunction motion risked disrupting any amended scheduling order, the potential impact of the motion should have been raised long ago. At bottom, having controlled and caused the delaying events, Plaintiffs cannot now claim that they have distracted themselves from their obligation to comply with the Court's longstanding scheduling order.

Moreover, Plaintiffs overstate the burdens placed on their experts by the preliminary injunction proceedings. Producing considered material, preparing for and giving a deposition, and preparing for and giving live testimony requires a handful of days at most. Moreover, by Defendants' observation, none of Plaintiffs' experts sat through the entire hearing. To the extent that some of Plaintiffs' experts attended the hearing beyond giving their own testimony, that was Plaintiffs' choice. Nothing prevented Plaintiffs from having their experts simply review the transcripts, or from just directing specific questions to them. Certainly, counsel were occupied by the preliminary injunction process, but given that counsel do not generally write expert reports, this does not justify Plaintiffs' experts' untimely completion of their work.

Plaintiffs simply assert that their experts had to "put aside their other work" on account of Plaintiffs' preliminary injunction motion. Motion at 5. Yet, Plaintiffs' Motion does not explain what this "other work" consisted of, why specific experts had to put it aside, or why its completion is now impossible. Again, Plaintiffs bear the burden to demonstrate to the Court that

they were diligent and yet why the existing schedule "*cannot be met*." Particularly in view of the lengthy time Plaintiffs have had to prepare their case, and the fact that they controlled the timing of the preliminary injunction proceeding, generalizations and speculation such as Plaintiffs have offered fall well short of this mark.

B. Plaintiffs' Requested Delay Would Severely Prejudice Defendants

Contrary to Plaintiffs' assertion, Motion at 6, delaying the production of expert reports by four months would substantially prejudice Defendants. *Cf. Marcin Eng'g*, 219 F.R.D. at 523-24 (denying motion to extent time for expert discovery in part due to prejudice to non-movant). As Plaintiffs note, they have not proposed moving the September 2009 trial date, or any other date for that matter, apart from the deadline for initial expert reports. The proposed change, therefore, simply compresses the balance of the litigation schedule, shrinking by four months the time that Defendants have to digest Plaintiffs' expert case, and then prepare their expert report on damages, due in March 2009, their dispositive motions, due in April 2009, any Motions in Limine, due in July 2009, and finally to respond at trial, in September 2009. The net effect of Plaintiffs' request, therefore, would be only to deprive Defendants of four additional months in which to prepare to respond to Plaintiffs' scientific case.

Unlike many cases, which turn on facts that are known by and accessible to both sides from the outset, this litigation is, at bottom, an expert-driven science case. This is well illustrated by the recent preliminary injunction hearing during which the State called numerous expert witnesses, but only two brief fact witnesses: Secretary Tolbert, a lawyer who formerly worked for General Edmondson; and Dr. Winn, who went undisclosed to Defendants until days before the hearing. The simple truth is that until Defendants receive Plaintiffs' final expert reports setting forth the actual scientific theories that Plaintiffs will offer at trial and the facts on which

they will rely, Defendants cannot begin to prepare an effective and comprehensive scientific defense. Plaintiffs have had years to study the Illinois River Watershed and to prepare their scientific case. Defendants' time to respond is already short enough. Defendants therefore eagerly await April 1, 2008, and respectfully oppose any suggestion of further delay.

While Plaintiffs suggest that the preliminary injunction process has somehow benefited Defendants, Motion at 6, the fact is that Plaintiffs' case, as Defendants understand it, principally regards nutrients, not bacteria. Throughout the preliminary injunction proceedings, Plaintiffs opposed vigorously any effort by Defendants to obtain any information about Plaintiffs' broader case. In fact, Plaintiffs' counsel instructed witnesses not to answer deposition questions that might have delved into Plaintiffs' non-bacteria expert case. *See, e.g.*, Exhibit 3 (Engel Depo. 71:1-73:12 (witness instructed not to answer question regarding phosphorous modeling)). The majority of Plaintiffs' case, therefore, remains a mystery to Defendants. Even as regards bacteria, given an additional four months to prepare their experts' opinions, there is no guarantee that Plaintiffs will arrive at trial with a theory that even remotely resembles their preliminary injunction case.[3]

Contrary to Plaintiffs' argument, the preliminary injunction hearing demonstrated why it is critical for Defendants to obtain access to Plaintiffs' expert case at the earliest possible moment. At the preliminary injunction hearing Plaintiffs' experts admitted that they have been working to develop allegations against the Defendants for the past three years. *See, e.g.* 5 (Official Transcript (OT.__) 271:8-10 (Dr. Teaf working on the case since 2004); 631:1-2 (Dr. Harwood first contacted in 2004)). Moreover, Plaintiffs' experts admitted that their work in this case is novel and that no other scientists in the world have ever done what these scientists

[3] Indeed, Plaintiffs' case began to shift even during the recent hearing, straying from bacteria to viruses. Exhibit 4 (Daily Hearing Transcript 1573:25-1574:23).

purport to have done. *Id.* (OT. 715:8-716:12, 661:18-22, 864:5-865:7); Exhibit 6 (Olsen Depo. 120:13-18; 121:3-122:2). Consequently, this is not a case where both Plaintiffs and Defendants can conduct simultaneous expert work. Rather, Defendants need to understand the claims of Plaintiffs' experts first, and then need time to work with their own experts to prepare the defense.

For the foregoing reasons, Defendants oppose Plaintiffs' request to further delay production of their expert reports.

Respectfully submitted,

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